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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 583

CECIL B. SANNER and MARY W. SANNER,

Petitioners

v.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Cecil B. Sanner and Mary W. Sanner, petition this Court for a writ of ceriorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 1, 1968.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at_____ F.2d ____, and is reprinted in the appendix hereto at p. A-1, *infra*. The un-

reported order of the United States District Court for the District of Maryland is printed in the record at p. R-App. 25, and the opinion of the District Court is reported at 278 F.Supp. 138, and printed in the record at p. R-App. 15.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 1, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the judicially created doctrine of charitable immunity, which totally bars any right of action in tort against a private corporation, characterized as a charitable institution, violate Article XIV, Section I of the Constitution of the United States, and is such denial of a right of action the taking of property without due process of law?

2. Is it a violation of the due process clause of Article XIV, Section I of the Constitution of the United States to deny to a party any right of action against a private corporate tortfeasor, which is characterized as a charitable institution, under the doctrine of charitable immunity, when the charter of such private corporation specifically provides said corporation with the powers to "sue and be sued"?

3. Is it a violation of the equal protection clause of Article XIV, Section I of the Constitution of the United States when the doctrine of charitable immunity, aforesaid, singles out tort claimants and totally bars any tort action by them against a private corporate tortfeasor, yet does not bar any other forms of actions for damages against such private corporation?

4. Is the doctrine of charitable immunity aforesaid which totally bars any action in tort against a private corporate tortfeasor, and any alleged statutory approval thereof, imposing a penalty on such tort claimants couched in lan-

guage so broad as to be indeterminate, indefinite and vague in violation of the due process clause of Article XIV, Section I of the Constitution of the United States?

5. Is not Article 48A § 480 of the Annotated Code of Maryland (1957 Ed.), alleged to be legislative approval of the doctrine of charitable immunity violative of the due process and equal protection clauses of Article XIV Section I of the Constitution of the United States for the reason set forth above?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The Annotated Code of the Public General Laws of Maryland (1957 Ed.), Volume 9A—Declaration of Rights

> **Page 42, Article 19.** *Remedy for injury to person or property:* That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.
>
> **Page 42, Article 20.** *Trial of facts where they arise:* That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People.

Page 49, Article 23. *Due process:* That no man ought to be taken or imprisoned or disseized of his freehold liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of life, liberty, or property, but by the judgment of his peers, or by the Law of the land.

Volume 5, Page 291, Insurance Code

Article 48A, § 480. *Waiver of immunity of charitable institution for torts:* Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution.

Volume 4, Page 181, Executive and Administrative Departments.

Article 41 § 103A. *Charitable Organizations, Definitions.* As used in this subtitle: "Persons" means any individual, organization, group, association, partnerships, corporation, or any combination of them; "charitable organization" means any benevolent, philantropic, patriotic, eleemosynary person, or one purporting to be such; "contribution" means the promise or grant of any money or property of any kind or value; and "department" means the Secretary of State of Maryland

STATEMENT OF CASE

This case is intimately concerned with the constitutional guarantees of the person under the provisions of Article XIV, Section I of the Constitution of the United States, and alleges that those guarantees are violated by the doctrine of charitable immunity.

This tort action was commenced by petitioners against respondent in the United States District Court for the District of Maryland, based upon diversity of citizenship.

Petitioners, on or about December 9, 1963 entered into a contractual relation with respondent whereby petitioner, Mary W. Sanner, would be admitted to respondent's facilities for care and treatment, in consideration of which petitioner, Cecil B. Sanner, without compensate respondent. The female petitioner was admitted to the full and exclusive care of respondent, for which it was fully compensated. On or about March 4, 1964, female petitioner fell from an upper story window or door sustaining extensive permanent injuries. Thereafter petitioners filed their complaint (p. R-App. 1) alleging respondent's negligence; further basing its right of action under the charter provisions of respondent (p. R-App. 4); and the provisions of Article 19 and 23 of the Declaration of Rights of the Constitution of Maryland.

Respondent's answer admitted it assumed full care and treatment of the female petitioner, and admitted that it was a corporation formed under the provisions of Chapter 274 of the Acts of the Maryland Legislature of 1853. Further answering, respondent denied (1) that it was an ordinary business corporation, and (2) that it was guilty of any acts of negligence. By way of positive defenses respondent alleged, (1) that it was immune from suit in tort as an eleemosynary institution, (2) that the female petitioner was guilty of contributory negligence, and (3) that female petitioner had assumed the risk.

Respondent, thereafter, filed a motion for summary judgment pursuant to the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure, contending that under the laws of the State of Maryland it was a charitable instituion and totally immune from suit in tort. Petitioners opposed said motion on the grounds that the granting of summary judgment would be a denial of rights guaranteed by Article XIV, Section I of the Constitution of the United States, and the synonymous and concomitant guarantees of Articles 19, 20 and 23 of the Declaration of Rights of the Constitution of Maryland.

Oral argument on the motion was presented on November 3, 1967 before the District Court, and thereafter a final

order was entered on January 2, 1968 granting respondent summary judgment. A written opinion in support of summary judgment is reported at 278 F.Supp. 138, and printed in the record at p. R-App. 15.*

Petitioners then filed an appeal to the United States Court of Appeals for the Fourth Circuit continuing their objections to the granting of summary judgment as violative of guarantees and rights under the Constitution of the United States.

On July 1, 1968 the Fourth Circuit Court affirmed the granting of summary judgment, together with a per curiam opinion reported at ___ F.2d ___, and reprinted in the appendix hereto at p. A-1).*

This matter now comes before this Court on this petition for writ of certiorari.

REASONS FOR GRANTING WRIT

1. The Fourth Circuit's approval of the granting of summary judgment herein, which summary judgment forecloses a right of action in tort against the private corporate respondent, raises novel and significant questions under Article XIV, Section I of the Constitution of the United States, deserving of consideration by this Court.

Impingement of federal constitutional guarantees by state action is the primary question herein involved. The fact that this matter is one based upon diversity of citizenship is a mere corollary.

If, as here, there is an allegation of negligence on the part of a so-called charitable institution, and the injured party seeks to proceed against said charitable institution for redress that person is totally barred from maintaining the action under the immunity doctrine. This denial of access to the courts is completely alien to the concepts of due process, justice, and fair play.

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*"R." refers to Record and "A." refers to Appendix herein.

The concepts of due process as set forth in the case of *Truax v. Corrigan*, 257 U.S. 312[1] do not contemplate such a denial of individual rights and freedoms, or the imposition of such a severe penalty. The charitable immunity doctrine first singles out victims of negligence, and then upon this condition, wholly out of the control of the victim, seeks to declare them non-persons in the eyes of the law.

In the instant matter denial to petitioners of the right to petition the courts for redress of injury inflicted by the corporate respondent herein is equally an impingement on rights guaranteed by the Constitution, and a violation of due process, as the denial of public office to one who will not first profess a belief in God[2], or denying one to marry whom he choses[3], or denying access to the courts merely because claimant is an illegitimate[4], or because claimant is mother of deceased illegitimate[5], or the state enforcing private restrictive covenants[6], or a state refusing to give full faith and credit to a sister state's laws[7].

These individual rights and freedoms were all denied by state action, until recourse was had to this Court.

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[1] *Truax v. Corrigan*, 257 U.S. 312, 322, "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." citing, *Hurtado v. California*, 110 U.S. 516, 535.

[2] *Torcaso v. Watkins*, 367 U.S. 488.

[3] *Loving v. Comm. of Virginia*, 388 U.S. 1.

[4] *Levy v. Louisiana, et al*, 88 S.Ct. 1509.

[5] *Glona v. Amer. Guar. & Liab. Ins. Co.*, 88 S.Ct. 1515.

[6] *Shelley v. Kraemer*, 334 U.S. 1.

[7] *First Nat'l. Bank of Chicago v. United Air Lines, Inc.*, 342 U.S. 396.

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment it is the obligation of this Court to enforce the constitutional commands." *Shelley v. Kraemer,* 334 U.S. 1, 20.

Federally asserted rights can not be discarded or ignored under the guise of local practice. *Davis v. Weschler,* 263 U.S. 22.

Under the clearly pronounced exception in *Erie R.R. Co. v. Thompkins,* 304 U.S. 64, 78, the federal courts are free to exercise independent judgment where federal constitutional rights are being impinged.

Maryland, and other states as will be shown, *infra,* have consistently denied the right of petition to the courts to seek redress for negligently inflicted injuries, where the action is alleged and directed against the so-called charitable institution.

That the right to petition the courts for redress is a constitutional guaranteed right is fundamental. *United Mine Workers of Amer. Dist 12 v. Illinois Bar Ass'n,* 88 S.Ct. 353; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673.

Petitioners contend the right to recover damages against another who negligently inflicts injury has always been recognized as a property right. This premise was subscribed to by the District Court in its written opinion (p. R-App. 21), citing *Martinez v. Fox Valley Bus Lines,* 17 F.Supp. 576. Petitioners have asserted the invasion of a substantive right under the Federal Constitution the denial of the opportunity to be heard is a deprivation of their property without due process of law. *Brinkerhoff-Faris, supra.*

The ultimate determination of whether or not a federally asserted right is being denied by a state, either through its judiciary or statutory enactment is for this Court to determine, *Titus v. Wallick,* 306 U.S. 282.

The Constitutional rights asserted are serious, and concern extremely fundamental rights of the person, and this case, which is believed to be the first to be presented on a federal appellate level, appears most opportune to clearly determine the questions raised for far reaching future effect.

2. Respondent's charter, substantively unchanged since its enactment in 1853, provides that respondent can undertake all the normal functions of an ordinary business corporation. It further provides, *inter alia,* that said corporation can, "*. . . sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any court of law or equity.*" Yet when the female petitioner was negligently injured respondent raised the doctrine of immunity to totally foreclose petitioners from any legal action against respondent.

That a so-called eleemosynary institution can sue and be sued was recognized by this Court as far back as 1819[8], about thirty-four years before incorporation of respondent, and fifty-seven years before the doctrine of charitable immunity ever crept into the law in the United States.

The socio-economic burden of the doctrine is manifest for by immunity the institution is not only able to practice its operation negligently, but then visits upon the injured, most often those least capable of coping with the financial burden of injury, the added burden of not being able to seek compensation for their injuries.

That immunity is the exception rather than the rule is highlighted in two decisions of this Court, where immunity was considered and denied from the more legitimate or valid base of *governmental or sovereign immunity,* rather than immunity as a special privilege extended to a private corporation by the state.

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[8]See Justice Story's excellent analysis of eleemosynary corporations and their rights and powers in *The Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518.

This Court held that where Congress *clearly intended* governmental corporations to be amenable to suit that such corporations could not acquire the immunity of the sovereign. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381; *Reconstruction Finance Corp. v. J & G Minihan Corp.*, 312 U.S. 81. In the *Keifer* case, *supra*, Justice Frankfurter went so far as to observe that the Smithsonian Institution the oldest surviving governmental corporation had several times been party to litigation even in the absence of explicit authority *to sue and be sued*, though the attitude towards immunity was substantially different in 1846 from what it is today.

That a corporation of Maryland generally is liable for its torts, even such torts as libel, see the decision of this Court in *The Philadelphia, Wilmington & Balt. R. Co. v. Quigley*, 21 How. 202.

Foreclosing petitioners from access to the courts to present their claim against respondent, in the light of these additional facts is a denial of due process generally, and the taking of their property without due process of law.

3. The charitable immunity doctrine prevents a tort suit, and in Maryland is based upon the so-called *trust fund theory*, that is, damages should not be awarded in tort thereby depleting the *trust funds* of the charity. This doctrine had its birth in dicta in the English case of *Feofees of Heriot's Hospital v. Ross*, 8 Eng. Rep. 1508 (1846), which had been twice overruled in England in 1866[9] and 1871[10]. The Ross case, *supra*, though no longer valid in England, found new life as precedent for the doctrine in the United States. In 1885 the charitable immunity doctrine found its way into the law of Maryland, based on the *trust fund theory*. *Perry v. House of Refuge*, 63 Md. 20. This judicially

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[9] *Mersey Docks Trustees v. Gibbs*, 11 Eng. Rep. 1500 (1866).

[10] *Foreman v. Mayor of Canterbury*, 6 Q.B. 214 (1871)

created doctrine, and a later statutory enactment[11] directed against insurance companies, which allegedly shows approval of the Maryland Legislature, totally precludes the payment of damages for *torts.*

The fallacies of the doctrine become immediately apparent—the doctrine attempts to prevent diminution of *trust funds* by denying damages *ex delicto* being paid from such funds. However, it is obvious that tort litigants are not the only ones who seek damages, and the so-called *trust funds* can be equally diminished by the payment of damages *ex contractu.* Yet, the decisions and the specific language of the statute noted above are directed to damages for torts.

Obviously, the doctrine does not accomplish the purpose for which it was intended, but is in fact an arbitrary, invidious and discriminatory classification of litigants in clear violation of the equal protection clause of the Constitution of the United States. *Gulf C & S F R Co. v. Ellis,* 165 U.S. 154.

The effect of the doctrine is inequality, it arbitrarily discriminates between litigants, and illegitimizes tort litigants. Tort litigants are not only the victims of negligence, but under the doctrine are, in effect legally declared *non persons* with no right of access to the courts to seek redress against institutions such as respondent. The decisions and rationale in two recent cases, decided by this Court, appear particularly applicable to this *inequality. Levy v. Louisiana, et al,* 88 S.Ct. 1509; *Glona v. American Guarantee & Liability Insurance Co.* 88 S.Ct. 1515.

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[11] Article 48A § 480, Annotated Code of Maryland (1957 Ed.) the text of which is printed at page 4, is found in the insurance section and directed to insurance companies, denying to such insurers the right to claim the immunity of the institution. This statutory provision is an obvious but ineffectual attempt to offer some relief from the oppressiveness of the doctrine. The statute, if as alleged, is a manifestation of legislative approval, is as much a denial of due process as the original judicially enunciated rule.

Finally, it is submitted that it is a denial of equal protection of the laws to treat the *corporate person* and the *human person* differently, in this instance. Here the corporation can do all things such as contract and has power to *sue and be sued*, however, when the respondent negligently injures one it contracted with that person can not sue the corporate respondent. However, the converse is not true, should the human person negligently damage the respondent, in any manner, the corporate respondent has free access to the courts for redress.

4. The Fourth Circuit Court has decided an important question of federal constitutional law which has not been, but should be decided by this Court. A decision by this Court will have far reaching future effect, and will tend to unify and stablize what is presently a chaotic state of the law.

It is believed that no case has ever reached this stage of seeking certiorari from this Court to determine whether or not the doctrine of charitable immunity impinges federal constitutional guarantees.

The state of the law is so chaotic generally, and with regard to constitutional implications, that a decision by this Court will have substantial far reaching future effect as shown by the following analysis:

Of the forty-seven states that have considered the doctrine, some twenty-seven states still adhere thereto in varyinf forms, and based upon unbelievably divergent logic. Some states (such as Maryland) adhere to the doctrine based on the so-called *trust fund* theory, others subscribe to the doctrine by rejecting *respondent superior*, and still others on the figment of *implied waiver* of the victim of the victim of negligence. From these three basic theories there are innumerable extrapolations: in some instances the charitable institution is, (1) totally immune, (2) not liable to recipients of the charity, (3) liable only to strangers, (4) not liable out of charitable funds, (5) liable only to paying patients, (6) not liable in regard to non-commercial activi-

ties, (7) not liable only if not a hospital, (8) not liable if not insured, and (9) in two instances there is right to *total immunity even if insured.*

Further complicating the state of the law is the fact that four states have considered the doctrine from the aspect of constitutional impingement of rights, either from the aspect of the Federal or State Constitution. One state in a case of first impression[12] considered its own constitutional guarantees and rejected the doctrine stating that the policy of that state was "to put justice 'by due course of law' above charity". This holding was later affirmed[13]. A second state which previously accepted the doctrine abrogated it after considering its constitutional guarantees for the first time[14], and later rejected a statute which attempted collaterally, in effect, to reinstate the doctrine[15]. A third state court considering the allegations that the doctrine impinged federal and state constitutional guarantees held the doctrine constitutional[16]. And, a fourth state court also considering federal and state constitutional guarantees held the doctrine constitutional.[17]

Twenty states and the District of Columbia[18] have abrogated the doctrine, and three states, Hawaii, New Mexico, and South Dakota have never passed on the doctrine either by statute or court decision.

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[12]*Nicholson v. Good Samaritan Hospital* (Fla.), 199 So. 344.

[13]*Wilson v. Lee Memorial Hospital* (Fla.), 65 So.2d 41.

[14]*Noel v. Menninger Foundation* (Kan.), 175 Kan. 751.

[15]*Neely v. St. Francis Hospital & School of Nursing* (Kan.), 192 Kan. 716.

[16]*Fournier v. Miriam Hospital* (R.I.), 93 R.I. 299.

[17]*Makar v. St. Nicholas Church* (N.J.), 78 N.J. Super 1.

[18]*President & Dir. of Georgetown College v. Hughes,* 130 F.2d 810, 814. "When an individual human being undertakes not simply an isolated act, but a habit or business of charity, without incorporating or casting it in the form of a trust, he does not acquire immunity.

The foregoing analysis shows the complete chaos existent from the extreme of state courts holding the doctrine constitutional to other state courts holding the doctrine unconstitutional, with myriad variations therebetween.

Those states that have abrogated the doctrine, though not on constitutional grounds, have strenously assailed the rationale that brought the doctrine into existence[19] and show how completely alien the doctrine is to justice and fair play.

A decision by this Court in the instant case will effectively stabilize the law, and will have far reaching effect on much obvious future litigation.

5. Neither the judicial decision, nor any statutory provision[20] which manifests alleged legislative approval of the

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Possibly half the medical service rendered today is charity practice. So is a large share of legal service. Some physicians, and perhaps some lawyers, spend half or more of long and useful careers ministering to the sick and the troubled without pay. Many more do so habitually, but less extensively. Yet they do not have leave to be careless, notwithstanding their kindness is continuous or habitual rather than casual or occasional. Nor would they if it were conducted through or in association with others. Only when an individual institutionalizes his charitable enterprise formally, as by incorporation or possibly by creating a trust, *does he succeed in casting the whole burden of its negligent operation on those it injures.*"

[19]In abrogating the doctrine the New York Court in *Bing v. Thunig*, 2 N.Y.2d 660, 163 N.Y.S.2d 3 was prompted to take the following quotation from a sister state: "This historical item prompted one court, which recently abandoned the immunity doctrine to say, "Ordinarily, when a court decides to modify or abandon a court-made rule of long standing it starts out by saying that "the reason for the rule no longer exists". In this case, it is correct to say that the 'reason' originally given for the rule of immunity never did exist." *Pierce v. Yakima Val. Mem. Hosp. Ass'n*, 43 Wash.2d 167, 260 P.2d 768.

[20]Article 48A § 480 of the Maryland Code reprinted at p. 4, though specifically spelling out 'torts' is non specific as to what a 'charitable institution' is, or how many or what types of institutions are embraced therein.

doctrine, sets any clear standard of what a charitable institution is for the purposes of the severe penalty to be imposed, that is, foreclosure from the courts.

A search of the entire Maryland Code reveals but one section[21] where there is any reference to a charitable institution, which may serve as a standard of what is embraced in that phrase. However, if this definition is applied, then under the doctrine of charitable immunity a tort action could never be maintained against virtually anyone.

When a penalty is to be imposed, as here a denial of access to the courts for redress of a wrong, the standard should not be couched in vague, indefinite, and indeterminate terms. *Cramp v. Board of Public Instruction, Orange Cty. Fla.*, 368 U.S. 278.

6. The Fourth Circuit Court's decision in this case, which involves serious federal constitutional questions, is contrary to decisions of this Court. The full impact of the decision is that the Fourth Circuit feels constrained to follow the decisional or statutory law of the State of Maryland because this is a diversity case. This is noted in the opening portion of the opinion, wherein after noting a statutory relaxation in the doctrine, the Court states: "Ordinarily such a matter is one for state law." Citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The Court then summarily rejects petitioners' constitutional arguments.

Under the clearly enunciated exception of the *Erie doctrine* a federal appellate Court is not bound by state law where federal constitutional rights are being impinged, and in this area the court can, *and should*, exercise independent judgment. This duty is even more manifest in view of the seri-

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[21] Article 41 § 103A of the Annotated Code of Maryland reprinted at p. 4, is the only place in the Code where a definition is found for "charitable organization". The broad sweep of the language therein is such as to make even an "individual" who merely purports to be "eleemosynary" a "charitable organization". Thus, even an individual could possibly avoid tort liability under the charitable immunity doctrine.

ous constitutional rights being impinged, the chaotic state of the law, and the fact that diversity is a mere corollary of the action.

The Court of Appeals of Maryland when recently faced with a constitutional attack upon the denial of the right to sue for loss of consortium by a wife, though resolving the matter on other grounds, recognized its obligation and duty to consider the decisional rationale afresh[22].

In the light of recent decisions of this Court zealously protecting the rights of the individual from interference by the state[23], it is submitted that the Fourth Circuit's decision which continues the total denial of access to the courts by litigants in tort against institutions such as respondent, is contrary to this Court's decisions.

With regard to the statutory relaxation[24] noted by the Fourth Circuit, in its decision, though this provision does not apply to the instant case, it also is violative of the guarantees of Article XIV, Section I of the Constitution of the United States.

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[22] *Deems v. W. Maryland R. Co.*, 231 A.2d 514, 518: "But, if a past decision is found to be violative of the federal constitution, the policy of stare decisis cannot save it. *** When the attack upon the doctrine is based on federal constitutional grounds, the Court must consider the decisions afresh from the point of view, not of what is desirable as a matter of state law, but of impingement of constitutional requirements."

[23] *Torcaso v. Watkins*, 367 U.S. 488; *Loving v. Comm. of Virginia*, 388 U.S. 1; *Levy v. Louisiana, et al*, 88 S.Ct. 1509; *Glona v. American Guarantee & Liability Insurance Co.*, 88 S.Ct. 1515.

[24] Article 43 § 556A, Annotated Code of Maryland (1957 Ed.–1966 Supp.):

> "Immunity from tort liability. No Hospital or related institution as defined in this subtitle shall be immune from liability for negligence or any other tort on the grounds that it is a charitable institution; provided, however, that a hospital or related institution *which is a charitable institution* and which is insured against such liability in an amount not

CONCLUSION

For these reasons the judgment below should be reviewed on writ of certiorari.

Respectfully submitted

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less than $100,000 shall not be liable for damages in excess of the limits of such insurance." (Emphasis added)

This article, like Article 48A § 480, is another but ineffectual attempt of the legislature to afford some relief from the oppressiveness of the doctrine of charitable immunity. However, initially, the provision *does not abrogate the doctrine,* it continues the *unequal* treatment of litigants in tort claimants, and continues to be vague and indefinite since it does not define when a "hospital or related institution" is a "charitable institution".

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,207.

Cecil B. Sanner and Mary W. Sanner,
Appellants,

versus

The Trustees of the Sheppard and Enoch Pratt Hospital,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. EDWARD S. NORTHROP, JUDGE.

(Argued June 20, 1968. Decided July 1, 1968.)

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges.

D. Robert Cervera (Joseph I. Huesman on brief) for Appellants, and Norman P. Ramsey (James D. Peacock and Cleaveland D. Miller; and Semmes, Bowen & Semmes on brief) for Appellee.

PER CURIAM:

Except for an important statutory relaxation[1] in 1966, Maryland judicially adheres to the so called doctrine of charitable immunity. Ordinarily such a matter is one of state law. *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938). We have carefully considered plaintiff's interesting contention that the state of Maryland may not constitutionally cling to this judge-made, and increasingly questioned, doctrine. We reject the contention and affirm the granting of summary judgment in favor of the charitable institution.

Affirmed.

[1] Maryland Code Annotated Art. 43 § 556A (Supp. 1966).

JUDGMENT

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SANNER VERSUS SHEPPARD, PRATT AFFIRMED. PHOTO-COPY OPINION BY MAIL TODAY. PRINTED COPY LATER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 583

CECIL B. SANNER AND MARY W. SANNER,
Petitioners,

v.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The Daily Record Co., Baltimore, Md. 21203

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Petitioners' argument that the state of the law as to charitable immunity is so "chaotic generally" among the several States (particularly with reference to constitutional implications) that this Court should grant the petition and impose one uniform and standard rule for all fifty states is without merit and misconceives the present state of the charitable immunity doctrine.

First, it is not true, as Petitioners would have this Court believe, that the state and federal courts are in hopeless conflict over the federal constitutional implications of charitable immunity. On the contrary, every court which has

ruled on the question has held that the doctrine of charitable immunity does not violate the equal protection or due process clauses of the 14th Amendment. See, *Weeks v. Children's Hospital of Philadelphia*, 200 F. Supp. 77 (E.D. Pa. 1961); *Makar v. St. Nicholas Church*, 78 N.J. Super. 1, 187 A. 2d 353 (1963); *Fournier v. Miriam Hospital*, 93 R.I. 299, 175 A. 2d 298 (1961). In *Fournier*, the court stated:

> "The plaintiff's contention that art. XIV, §1, of amendments to the federal constitution renders the immunity statute invalid is likewise without merit. Her argument is that the statute is a denial of due process and constitutes discrimination in violation of the equal privilege and protection clauses. This court in *In the Matter of Nichols, supra*, 8 R.I. at page 54, observed that, 'Although, in a free government, every man is entitled to an adequate legal remedy for every injury done to him, yet the form and extent of it is necessarily subject to the legislative power * * *.'
>
> "Nor is an act of the legislature adopted pursuant to its power to declare public policy in violation of art. XIV of the amendments, if the act in question is neither capricious nor arbitrary in the sense that it does not discriminate between persons, groups or corporations, falling within the same classification." 175 A. 2d at 301.

And in *Weeks*, the district court said:

> "In order to be violative of the equal protection clause of the Fourteenth Amendment, a state law must be shown to be without any reasonable basis and to be purely arbitrary. *Morey v. Doud*, 354 U.S. 457, 463, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957). The burden of showing the essential arbitrary nature of said law is on the party assailing the classification. *Morey v. Doud*, *supra*.
>
> "Plaintiff has not sustained her burden of proving that Pennsylvania has denied her due process of law and the equal protection of its laws because its courts

exempt charitable institutions from the doctrine of respondeat superior in tort cases such as the instant one.

"Even if a state law discriminates in favor of a certain class, the law is not arbitrary and violative of the equal protection clause if the discrimination is grounded on a reasonable distinction. *Tax Commissioners v. Jackson,* 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931). The Supreme Court has found laws based on various distinctions constitutional. Cf. *Helvering v. Bliss,* 293 U.S. 144, 149-151, 55 S. Ct. 17, 79 L. Ed. 246 (1934).

"This court can find no reason to declare this Pennsylvania rule so arbitrary as to be a violation of due process of law. The law, although classifying charitable institutions differently from other institutions, is founded on a reasonable basis. Charities are separately classified for tax purposes in Pennsylvania, as well as other states, and the Federal Government has passed tax laws containing preferential treatment for them. The same rationale which supports the above classifications supports the distinction under Pennsylvania law in the rule now before the court.

"The state has the power to provide for the health of its citizens. Non-profit hospitals which are supported in large measure by state funds bear a close relationship with this power. The health of the state's citizens might properly be considered in possible jeopardy if these charitable hospitals were made liable under the doctrine of respondeat superior for tort injuries caused by their servants." 200 F. Supp. at 79.

The three cases on which Petitioners rely to show the asserted conflict deal not with the federal constitution but with a state constitution. In both *Noel v. Menninger Foundation,* 175 Kan. 751, 267 P. 2d 934 (1954), and in *Neely v. St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P. 2d 155 (1964), the Kansas court, in striking down the charitable immunity doctrine, relied on Section

18 of the Bill of Rights of the Kansas Constitution. Neither case contained any discussion of the federal constitution.

In *Nicholson v. Good Samaritan Hospital,* 199 So. 344 (Fla. 1940) the court cited a provision of the Florida Constitution but only in support of its statement that courts should determine or fix public policy as reflected by the existing constitution and laws; and, accordingly, the court should not (in a case of first impression) recognize the doctrine of charitable immunity on the ground that such immunity would benefit public policy.

The diversity cited and complained of by Petitioners (Petition, pp. 12-14) is simply healthy diversity among the states on a matter of state law, and which exists because of our federal system of laws and government. This diversity has recently been documented in *Howard v. Bishop Byrne Council Home,* 249 Md. 233, 238 A. 2d 863 (1968) where the Maryland Court of Appeals noted:

> "Eight states agree with Maryland that, as a matter of public policy, eleemosynary institutions should be immune from liability to tort claimants, either on the theory that the charitable assets are placed in trust for charitable purposes, or that the doctrine of *respondeat superior* does not apply to religious or charitable organizations. Two of these states, Missouri and South Carolina, have even gone so far as to rule that a charitable corporation may set up its immunity even though it carries liability insurance.
>
> "At the other end of the spectrum are the twenty states and the District of Columbia which have in effect totally abandoned charitable immunity, and now hold all such institutions amenable to suit, and their property subject to attachment.
>
> "Most jurisdictions, however, are reluctant to totally withdraw immunity, and, therefore, they set up important distinctions. As a consequence, we discover that in most states, liability will depend on the type

of negligence, the function of the charitable institution at the time of the injury, the presence of liability insurance or any combination of these factors." 249 Md. at 237-38, 238 A. 2d at 865-66.

The Maryland Court of Appeals concluded:

"By reading the cases cited, plus numerous earlier decisions, the inescapable conclusion is reached that both imposition and abrogation of the immunity doctrine are products of specific circumstances. There is no universal sentiment charging charitable tort immunity to be unconscionable, a state subsidy to religious organizations or a deprivation of equal protection of the laws. Where states have chopped away at the doctrine, it has mostly been by processes of attrition and piecemeal adjudication, often accompanied by legislation amending the state insurance code." 249 Md. at 241, 238 A. 2d at 867.

The General Assembly of Maryland has kept the charitable immunity doctrine under close scrutiny for many years, periodically reviewing its wisdom and social utility. As stated in *Howard*, in 1947 it declined to enact a proposed bill which would have estopped any charitable institution from pleading immunity as a defense to a tort claim. Instead, it adopted a bill which estopped a liability insurer from setting up the charitable immunity of the insured. This has become Article 48A, §480 (Chapter 900, Acts of 1947), Annotated Code of Maryland (1957 Ed.), which reads:

"Each policy issued to cover the liability of any charitable institution for negligence or any other tort shall contain a provision to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by said policy, that such institution is immune from liability on the ground that it is a charitable institution."

In 1966, the General Assembly again modified the doctrine of charitable immunity by enacting Article 43, §556A (Chapter 673, Acts of 1966), Annotated Code of Maryland (1957 Ed.):

> "No hospital or related institution as defined in this subtitle shall be immune from liability for negligence or any other tort on the grounds that it is a charitable institution; provided, however, that a hospital or related institution which is a charitable institution and which is insured against such liability in an amount not less than $100,000 shall not be liable for damages in excess of the limits of such insurance."

Section 2 of Chapter 673 of the Acts of 1966 of the General Assembly of Maryland provides that "nothing in this act shall apply to claims for acts of negligence or other torts occurring before June 1, 1966."

Article 48A, §480 is not strictly applicable to this case because it is undisputed that Respondent did not carry liability insurance at the time that the Petitioners' alleged cause of action arose. This section is relevant here only to indicate that the General Assembly of Maryland has considered the question of charitable immunity and has approved the decisions of the Court of Appeals of Maryland, adding only that a charitable institution would be liable to the extent of any liability insurance carried by it. Hence, Petitioners' arguments that Article 48A, §480 is unconstitutional are not properly before this Court.

Hence, it can be seen that the question of charitable immunity, whether a state should adopt it and if so, to what extent, does not reach constitutional proportions. Rather, it remains a question for which each state provides its own answer. As this Court said in *Missouri v. Lewis*, 101 U.S. 22, 31 (1880):

> "The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line."

And see *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), where Mr. Justice Black, in the majority opinion, said:

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. * * * Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'"

Second, Petitioners have claimed (Petition, p. 11) that the charitable immunity doctrine has declared them "non-persons", in opposition to the rationale of *Levy v. Louisiana*, 88 S. Ct. 1509 (1968), and *Glona v. American Guarantee & Liability Insurance Co.*, 88 S. Ct. 1515 (1968).

Petitioners did, however, clearly have a right to sue the individual employees of Respondent involved in the allegedly negligent care of the Petitioner, Mary Sanner. *Perry v. House of Refuge*, 63 Md. 20 (1885); *Loeffler v. Sheppard-Pratt Hospital*, 130 Md. 265, 272, 100 A. 301, 303 (1917). Petitioners have elected not to file suit against such persons; thus, they have elected to forego their undisputable right and remedy against the individuals involved in favor of pursuing the Respondent against whom, at the time of the occurrence complained of, they had no right or remedy.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

NORMAN P. RAMSEY,
Counsel for Respondent.

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Respondent

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The sole basis for granting summary judgment to respondent herein was that the Law of the State of Maryland is that a so-called charitable institution is immune from suit in tort.

The motion for summary judgment was opposed by petitioners on the ground that the doctrine of charitable immunity violates Article XIV, Section 1 of the Constitution of the United States and the concomitant guarantees of the Declaration of Rights of Maryland.

By its motion for summary judgment respondent admits the truth of the allegations of the complaint, but represents that as a matter of law summary judgment should be granted. *Furton v. City of Menasha,* (CCA 7th) 149 F.2d 945, cert. den'd 326 U.S. 771; *Zell v. American Seating Co.,* (CCA 2d) 138 F.2d 641, rev. oth. grds. 322 U.S. 709; *Poller v. Columbia Broadcasting System,* 368 U.S. 464.

Not only has respondent admitted the truth of the allegations by virtue of its motion for summary judgment, but it specifically admitted in its answer (R-App. 8-10) that (1) its charter permits it to "*sue and be sued*", (2) it contracted with the petitioners for the care and treatment of the female petitioner, (3) it undertook the full, complete and exclusive care of the female petitioner.

Thus, the issue squarely before this Court, an issue moreover never heretofore considered by this Court or any Federal Appellate Court, is whether or not the doctrine of charitable immunity impinges the guarantees of Article XIV, Section 1 of the Constitution of the United States.

Respondent's brief is misleading in that it attempts to create the impression that there has been binding determination of the constitutional question herein involved, when it states in its brief (Pages 1 & 2):

> "On the contrary, every court which has ruled on the question has held that the doctrine of charitable immunity does not violate the equal protection or due process clauses of the 14th Amendment. See, *Weeks v. Children's Hospital of Philadelphia,* 200 F.Supp. 77, (E.D. Pa. 1961); *Makar v. St. Nicholas Church,* 78 N.J. Super. 1, 187 A.2d 353; *Fournier v. Miriam Hospital,* 93 R.I. 299, 175 A.2d 298 (1961)."

Respondent's citation of the *Weeks case,* supra, is interesting in its misleading effect, for respondent fails to bring to the Court's attention that in 1965 the doctrine of charitable immunity was totally abrogated by Pennsylvania in the case of *Flagiello v. Penn. Hospital,* 417 Pa. 486, 208 A.2d 193. The *Weeks* case, supra, much like the instant

case was in the Federal Courts by virtue of diversity of citizenship and the District Court, like the District Court below, was merely following the pronouncement of state law *at that time.* Were the same case to come before the District Court in Pennsylvania today that Court would undoubtedly follow the present law that holds such charitable institutions liable for tort.

In discarding the doctrine of charitable immunity the court in the *Flagiello* case employed language consistent with the definition of due process as enunciated by this Court in the case of *Truax v. Corrigan,* 257 U.S. 312, 322, and language so similar to the provisions of Articles 19 and 23 of the Declaration of Rights of Maryland, to wit:

> "Of course the precedents here recalled do not justify a light and casual treatment of the doctrine of stare decisis, but they proclaim unequivocally that *where justice demands, reason dictates, equality enjoins and fair play decrees a change in judge-made law courts will not lack determination to establish the change.*" (Emphasis added)

Respondents would have this Court bound by the decisions in the cases of *Makar v. St. Nicholas Church,* 78 N.J. Super. 1, 187 A.2d 353 and *Fournier v. Miriam Hospital,* 93 R.I. 299, 175 A.2d 298, merely because these *state courts preserved a matter of local policy* in the face of an attack on Federal Constitutional grounds.

Conveniently, respondent ignores the holdings of this Court, that with regard to questions involving the Constitution of the United States and the rights protected thereunder, that this Court, *not a state court,* shall be the ultimate determinor of whether or not there has been an impingement of those rights. See petition at Page 8:

> "Federally asserted rights can not be discarded or ignored under the guise of local practice. *Davis v. Weschler,* 263 U.S. 22."
>
> "The ultimate determination of whether or not a federally asserted right is being denied by a state, either

through its judiciary or statutory enactment is for this Court to determine. *Titus v. Wallick,* 306 U.S. 282."

Respondent though asking this Court to be bound by the determination of the state court decisions above, deprecates petitioners' further citation of the cases of *Noel v. Menninger Foundation,* 175 Kan. 751, 267 P.2d 934; *Neely v. St. Francis Hospital & School of Nursing,* 192 Kan. 716, 391 P.2d 155; and *Nicholson v. Good Samaritan Hospital,* 199 So. 344, because these cases rejected the doctrine of *charitable immunity* under the respective state constitutions.

The constitutions of these states assured *due process* to the individual, and these courts did not have to reach into the Federal Constitution to hold the doctrine of charitable immunity unconstitutional, as manifested by the quotation from the *Nicholson* case, supra; considering its Constitution, Declaration of Rights § 4:

> "That it would appear that the public policy of this state as enunciated by its Constitution, is to put justice 'by due course of law' above or before charity."

And, the following quotation from the case of *Noel v. Menninger Foundation,* supra, is particularly helpful in the consideration of *due process and equality:*

> "To exempt charitable and non-profit corporations from liability for their torts is plainly contrary to our constitutional guarantees, Bill of Rights § 18. *It gives certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens.*" (Emphasis added)

Interestingly, the Declaration of Rights or Bill of Rights of Florida and Kansas are virtually precisely similar to the language of guarantees of Articles 19 and 23 of the Declaration of Rights of Maryland. Yet never in the history of the charitable immunity doctrine, and numerous litigation, have the Courts of Maryland *ever looked to the guarantees under its Declaration of Rights.* Guarantees, which inci-

dentally, have by decisions of the Maryland Courts been held to be synonmous with the guarantees of *due process* of the Constitution of the United States. (See District Court Opinion R-App. 20).

Respondent conveniently totally ignores petitioners' position that the doctrine of charitable immunity is an invidious, arbitrary, and discriminatory classification of litigants without any reasonable basis for the purposes to be accomplished. The doctrine totally excludes damages *ex delicto* against respondent, but does not exclude damages *ex contractu* against respondent. The doctrine in Maryland being founded on the *trust fund theory*, the courts totally ignore the obvious fact that those trust funds can be just as easily invaded, diminished and depleted by damages *ex contractu* as damages *ex delicto*.

It is respectfully submitted that this type of classification of litigants is arbitrary and discriminatory contrary to the guarantees of Article XIV, Section 1 of the Constitution of the United States. *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 154, *Levy v. Louisiana*, 88 S. Ct. 1509.

Further, respondent totally ignores petitioners' arguments that the right to sue one for negligently inflicted injuries is a property right, as recognized by the District Court (R-App. 21), and that the denial of this right is a denial of due process. Or petitioners' argument that under the clearly pronounced exception of the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, that where a Federal Constitutional question is involved that Federal Courts, in diversity cases, *are not bound by state law*.

Corporate bodies, such as respondent, are legal fictions, creatures of the law, and can only act through their human instrumentalities. *The Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.Ed. 629.

Maryland has long subscribed to the doctrine of respondeat superior, that the corporate body is answerable for the torts of the corporate human instrumentalities *acting within*

the scope of their employment. The judicial decisions of Maryland show that corporations have been held liable for such torts as, *assault and battery, false imprisonment, false representations,*[1] *fraud,*[2] *libel,*[3] *malicious prosecution,*[4] *negligence*[5] and *slander.*[6]

Respondent's answer unequivocally admits the existence of a contract with petitioners, which contract was for the exclusive, complete and full care of female petitioner by respondent through the means of its agents, servants or employees. If the female petitioner was reduced to the total quadriplegia that she is through those agents, servants or employees acting *within the scope of their employment,* then under the doctrine of respondeat superior respondent is subject to an action in tort, and answerable for all proven proximate damages.

Due process is fully afforded respondent, since it has complete freedom and right to adduce evidence to carry the burden of the defenses it set forth in its answer (R-App. -10). If those agents, servants or employees were exceeding their authority then respondent is still afforded due process by proving such at a trial.

On the contrary, petitioners are denied due process, they are *totally barred* from any proof as against this respondent under the arbitrary doctrine of *charitable immunity.*

At page 6 of respondent's brief it is alleged that Article 48A § 480 is not properly before this Court. Respondent's

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[1] *Carter v. Howe Mach. Co.*, 51 Md. 290.

[2] *Purdum v. Edwards*, 141 A. 550, 155 Md. 178.

[3] *Philadlephia W & B.R. Co. v. Quigley*, 62 U.S. 202, 21 How. 202.

[4] *Carter v. Howe Mach. Co.*, 51 Md. 290.

[5] *United Laundries Co. v. Bradford*, 105 A. 303, 133 Md. 363.

[6] *Lewis v. Accel. Transportation Pony Exp. Inc.*, 148 A.2d 783, 219 Md. 252.

argument in this latter regard epitomizes contradiction. Respondent first states:

> "Article 48A § 480 is not strictly applicable to this case because it is undisputed that Respondent did not carry liability insurance at the time Petitioners' alleged cause of action arose."

In the very next sentence respondent contradicts itself by stating:

> "This section is relevant here only to indicate that the General Assembly of Maryland *has considered the question of charitable immunity and has approved the decisions of the Court of Appeals of Maryland,* adding only that a charitable institution would be liable to the extent of any liability insurance carried by it. Hence Petitioners' arguments that Article 48A § 480 is unconstitutional are not properly before this Court." (Emphasis added)

The Courts of Maryland have consistently held that Article 48A § 480 is binding upon them as a pronouncement of the General Assembly of Maryland. The Courts of Maryland have consistently used this pronouncement of the Legislature as the escape in refusing to abrogate the doctrine, claiming any change was the duty of the Legislature. *State of Md. for use of Cavanaugh v. Arundel Park Corp.*, 47 A.2d 863; *Gorman v. St. Paul Fire & Marine Ins. Co.*, 121 A.2d 812; *Howard v. Bishop Byrne Council Home, Inc.*, 238 A.2d 863.

Petitioners respectfully ask how can a law be a law and not a law, at one and the same time, as proposed by respondent?

The contradictory proposals of respondent with respect to Article 48A § 480 only serve to buttress petitioners' arguments of how vague, indefinite and indeterminate the language of Article 48A § 480 really is (See petition pages 14 and 15).

Further, respondent's statement with regard to Article 48A § 480 and respondent's lack of insurance, which was

of respondent's own choosing, perhaps to invoke sympathy for respondent, *poignantly emphasizes how completely the victim of respondent's negligences is wholly within the control of respondent under the doctrine of charitable immunity.*

It is respectfully submitted that this control, *coupled with a total denial of a right of action against respondent,* is not the constitutional concept of *due process* or *equal protection of the laws!*

By this doctrine, respondent and like institutions in those state adhering to the doctrine, can visit their negligence upon their victims with impunity. The doctrine permits the hiring of irresponsible financially judgment proof employees, permits negligent operations and supervision, and the doctrine is capable of permitting the most abject acts of perversion of the law, conspiracy and collusion with the promise of *total immunity*!

Obviously, vesting all control of the negligently injured victim's destiny wholly within the hands of the negligent charitable institution, with no recourse to the courts for redress of any wrongs, is a denial of the guarantees of Article XIV, Section 1, of the Constitution of the United States.

CONCLUSION

For these additional reasons the judgment below should be reviewed on a writ of certiorari.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 583

CECIL B. SANNER and MARY W. SANNER,
Petitioners

v.

THE TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL,
Respondent

PETITION FOR REHEARING

Petitioners pray that this Court grant a rehearing of its order of December 9, 1968 denying the petition for certiorari herein, the time for filing this petition was extended to and including February 3, 1969 by order of this Court signed by Associate Justice William J. Brennan, Jr.

REASONS FOR GRANTING WRIT

Petitioners wish to bring to the attention of the Court other and more substantial constitutional grounds available to them although not previously presented, pursuant to the provisions of Rule 58(2) of this Court.

Pursuant to the Constitution of Maryland of 1867, presently in effect (App. 16),* Article 8, Declaration of Rights relating to Separation of Powers; Article III, Section 48 relating to control of corporations by the Legislature; and the decisions of the highest Courts of Maryland it will be unequivocally shown that the doctrine of *charitable immunity* is a *total nullity.*

Further, it will be shown, that because the doctrine is a *total nullity,* that the application of the doctrine to petitioners is a most flagrant example of a denial of due process under the Constitution of Maryland, and a denial of due process and equal protection of the laws under Article XIV, Section I of the Constitution of the United States.

Additionally, it will be shown that there is a wide and substantial public interest in a definitive decision in the instant case, which will substantially affect the doctrine of charitable immunity as invoked in other states. This will be accomplished by showing an almost precise and parallel flagrant violation of constitutional prohibitions in sister states which unequivocally manifest a denial of due process and equal protection of the laws.

Initially, with respect to respondent, it was chartered in 1853 by Acts of the Legislature, Chapter 274, in which charter it was specifically provided *inter alia* that respondent could . . . *sue and be sued* (R.A. 4, 5), and by Section 9 of that charter that any repeal or amendment was reserved to the General Assembly (R.A. 7, 8).

The present Constitution of Maryland (App. 16), was adopted in 1867, and by Article 8 of the Declaration of Rights mandatorily provides for the *separation of powers* of the Legislative, Executive, and Judicial branches of government. Further, Article III, Section 48 of the Maryland

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*"R." refers to record. "A." refers to Appendix in original petition. "P." refers to original petition for writ, and "App." refers to appendix herein.

Constitution reserves control over corporation *exclusively* to the Legislature.

The first case imposing the doctrine of charitable immunity in the State of Maryland was the case of *Perry v. House of Refuge*, 63 Md. 20 (1885), which at the time of the decision was functioning under a charter granted by the Acts of the Legislature of 1830, Chapter 64, (App. 16) which provided *inter alia* that this private corporation had the power to *sue and be sued.* This provision has existed through subsequent charter amendments.

By the Constitution of Maryland, Article III, Section 48 the *exclusive power* and right to *alter, amend* or *repeal* a charter of a corporation *is reserved to the Legislature.*

When the Court of Appeals of Maryland imposed the doctrine of charitable immunity, in 1885, in the case of *Perry v. House of Refuge*, 63 Md. 20, by saying that the defendant therein could not be sued in tort—the court was transgressing a constitutional mandate of separation of powers, Article 8, Declaration of Rights (App. 16), and usurping powers exclusively reserved to the Legislature, Article III, Section 48 (App. 17).

That this is the law in Maryland is not only manifest from the above cited constitutional provisions, but by pronouncements on the precise point by the Court of Appeals of Maryland.

> "The right to amend the charters of all corporations created under the general corporation law of this State is *expressly reserved to the Legislature*, Section 48, Article 3 of the Constitution." *Hodges v. Baltimore Union Pass. Ry. Co.*, 58 Md. 603 (1882).

Thus, when the court in the *Perry case, supra,* announced its decision it modified the charter of the defendant corporation therein, because the *court felt that it was desirable that defendant corporation should be immune from responsibility in tort.* The court was flagrantly usurping powers *exclusively legislative.*

That the courts can not usurp strictly legislative powers is specifically spelled out in the Constitution in Article 8 of the Declaration of Rights, and where the point has been raised, the courts have been diligent in preventing usurpation of the rights of one department of government by another.

The function of the court *is not to make but to interpret and apply the laws,* the courts have no power to legislate and they can not usurp the functions of the Legislature. *Leser v. Garnett,* 139 Md. 46, aff'd 258 U.S. 130 (1921).

> "This Court *cannot enact legislation* but can only administer justice according to existing law. *Lickle v. Boone,* 187 Md. 579 (1947)
>
> "We have no authority in a case where the Legislature has spoken clearly, to distort its words and *usurp the function of the legislative branch of government by making judicial law.* It is true that real intent must prevail over literal intent. But that rule of construction is adopted only when the literal words of a statute may be something that the Legislature could not possibly have meant. It does not apply when the only basis for a construction other than a literal one are either that the Legislature should not have said what it did, or that it would not have said it, had it been in possession of all the facts. We cannot assume to say what the Legislature should have said, nor can we say whether it knew the facts or not, nor whether it would have decided differently had it known them. *All we can determine* in this case *is what the Legislature did say. And there is no ambiguity here. Clark v. Tawes,* 187 Md. 195 (1946).
>
> "And neither courts nor municipal officers may engraft an extended plan or policy, *however desirable or benevolent it may be, upon the statute, as the Legislature has passed it. Duncan v. Graham,* 142 A. 593, 155 Md. 507 (1928), *Hopper v. Jones,* 178 Md. 429."

Thus, in the *Perry* case, *supra,* the court in 1885, fifty-five years after the legislature granted the charter to defendant permitting it *to be sued,* and *three years* after the case of *Hodges v. Baltimore Union Pass. Ry. Co.,* 58 Md. 603 (1882) usurped legislative powers and meddled with the charter of the corporation.

Further, the court persists in transgressing the mandate of separation of powers with respect to similarly legislatively structured corporations, and this very respondent, by granting tort immunity; in the face of charter provisions; in the face of Article 8 of the Declaration of Rights; in the face of Article III; Section 48; and in the face of the above quoted decision of the Court of Appeals of Maryland that clearly proclaim a *hands off doctrine* where the pronouncements of the Legislature are *clear and unambiguous.* [See *Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital,* 100 A. 301, 130 Md. 265 (1917); *Howard v. South Baltimore General Hospital,* 62 A.2d 574, 191 Md. 617 (1948); *Howard v. Bishop Byrne Council Home, Inc.,* 238 A.2d 863 (1968)].

The doctrine of charitable immunity crept into the law of Maryland because of *a complete failure of the Court to look to the legislatively created charters, a complete failure to look to the Constitution of Maryland, and a complete failure to look to its own decisions on separation of powers and exclusive corporate control by the legislature.*

The language of the legislature in the charter of The House of Refuge (App. 16), defendant in the case of *Perry v. The House of Refuge,* 63 Md. 20, and the language of respondent's charter are *clear, unequivocal, unambiguous* and *positive*—these corporations, and similarly structured organizations, *can be sued in tort!*

Thus the doctrine of *charitable immunity* in the State of Maryland was, from its inception, and is a *total nullity.*

To deprive petitioners their rights as clearly spelled out in respondent's charter (R.A. 4, 5), in the Declaration of Rights Article 19 (P. 3), Article 20 (P. 3), and Article 23

(P. 4) and to perpetuate a *totally void doctrine* contrary to Article 8, Declaration of Rights of Maryland (App. 16) and Article III, Section 48 of the Constitution of Maryland (App. 17) is a most flagrant violation of due process and equal protection of the laws as guaranteed by Article XIV, Section 1 of the Constitution of the United States.

The doctrine of charitable immunity is an anachronism in the law that has and is adversely affecting the rights of all men. A refusal to render a decision in this case will not only deny constitutionally guaranteed rights to petitioners, but will adversely affect all men, as so well stated by President John F. Kennedy, June 11, 1963:

> "This nation . . . was founded on the principle that all men are created equal and that the rights of every man are diminished when the rights of one man are threatened." *[Quoted by Justice Thurgood Marshall when Solicitor General, "Law and Equality" 19th Annual Tyrrell Williams Memorial Lecture of the School of Law of Washington University, March 8, 1967.]*

That a refusal to hear this case will diminish the rights of all men will be shown by the following brief analysis manifesting the wide and substantial public interest vested in this case:

THE PUBLIC INTEREST

The self-same judicial legislation transgressing *mandatory constitutional provisions* that occurred in Maryland are also manifest in other jurisdictions, adhering to charitable immunity. And, in each of these instances, it is submitted, that the doctrine of charitable immunity is equally a denial of due process of laws and equal protection of the laws as guaranteed by those various state constitutions, as well as a violation of those guarantees set forth in Article XIV, Section 1 of the Constitution of the United States.

In Wymoing the Constitution of 1890 (App. 17-19), presently in effect, provides for *separation of powers* of govern-

ment, Article II. Further, control of corporations is exclusively reserved to the legislature, Article X, Sec. 1. Of first magnitude is the provision of Article X, Sec. 2, which mandatorily prevents *any law* being passed *limiting damages* against a corporation causing *death or injury to anyone.*

The first case to impose charitable immunity was decided in 1916, *twenty-six years* after the adoption of the constitution. *Bishop Randall Hospital v. Hartley,* 24 Wyo. 408, 160 P. 385. This corporation was a *private corporation* organized under Chp. 280 Com. Stat. of Wyoming of 1910. Among its many powers the charter provided that the copo-ration was empowered to *sue and be sued.*

Notwithstanding Article II and Article X, Secs. 1 and 2 the Wyoming Judiciary unconstitutionally transgressed its powers and legislated such private corporations immune from tort liability. And, by this unconstitutional judicial act denied to persons in Wyoming the constitutional guarantees of Article I, Secs. 6 and 8.

This judge-made law still denies recovery in tort for the negligence of the corporate servants, agents or employees.

Thus, as in Maryland, the aforementioned judicial legislation was and is not only a transgression of legislative prerogatives, *and a nullity,* but was and is a flagrant denial of due process and equal protection of the laws under the Wyoming Constitution and Article XIV, Section 1 of the Constitution of the United States.

In Colorado the Constitution (App. 19-20) was adopted in 1876, and by Article III provides for *separation of powers,* and by Article XV, Sections 2 and 3 corporate control is exclusively a legislative domain.

Approximately *forty-nine years* after the adoption of the Colorado Constitution the judiciary imposed the doctrine of charitable immunity in the case of *St. Mary's Academy, etc. v. Solomon,* 77 Colo. 463, 238 P. 22, 42 A.L.R. 964, adopting the so-called *trust fund theory.* Here again was judicial transgression of mandatory constitutional provi-

sions. Despite these constitutional provisions the court held, that though a charity could be sued, all of the assets of the *judicially so-called charity* are immune from attachment or satisfaction of the judgment. Obviously such a judgment is a hollow victory, totally meaningless, and a denial of the guarantees of the Constitution of Colorado. This is still the law in Colorado.

Interestingly enough *the legislature has never immunized such corporations,* quite the contrary a review of the Colorado Revised Statutes, Chapter 31, relating to Corporations, reveals under Article 2 the general corporation power to *sue and be sued.* More importantly Article 19 relating to *non-profit corporations* also grants the power to *sue and be sued.* Thus, legislatively, Colorado does not recognize immunity—*though imposing it judicially and unconstitutionally.*

It is submitted that the doctrine of charitable immunity is a flagrant denial of due process and equal protection under both the Constitution of Colorado and Article XIV, Section 1 of the Constitution of the United States.

South Carolina adopted its present Constitution (App. 20-21) in 1895; and it provides mandatory *separation of powers,* Article I, Section 14; and control of corporations by the Legislature, Article IX.

Again, notwithstanding these constitutional edicts, the judiciary *legislated* the doctrine of charitable immunity into being, *nineteen years* after the adoption of the constitution, *Lindler v. Columbia Hospital,* 98 S.C. 25, 81 S.E. 512, holding a private corporation *totally immune* from tort suit when acting in its so-called charitable operations.

Interestingly enough, in addition to the constitutional mandates, above cited, the legislature of South Carolina *has never immunized private corporations from tort suit,* to the contrary Title 12 Section 101(2) of the Compiled Code of Laws of South Carolina provides *that all private corporations created under the Laws of South Carolina shall have the power to sue and be sued.*

A more flagrant example of judicial legislation is the holding of the courts that notwithstanding the existence of insurance a private corporation functioning in its so-called charitable area *is totally immune. Decker v. Bishop of Charleston, S. C.*, 147 S.E.2d 264 (1966).

However, the ultimate of judicial legislation is the holding of the South Carolina Courts that the judicially legislated doctrine of charitable immunity applies *to employees of the so-called charity* contrary to the State's Workmen Compensation Laws. *Caughman v. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788. This in the face of the Workmen's Compensation Statute validly passed by the legislature wherein in Title 72, Section 13 *Employment* is defined as follows:

> *Employment.* The term employment *includes* employment *by the State,* all political subdivisions thereof, all public and quasi public corporations therein, *and all private employments* in which fifteen or more employees are regularly employed in the same business or establishment, except in agriculture and domestic service.

The state of the law in South Carolina is the grossest manifestation of judicial legislation, the grossest form of usurpation of legislative prerogatives, and the most heinous form of denial of due process and equal protection under the Constitution of South Carolina and Article XIV, Section 1 of the Constitution of the United States.

Alabama's Constitution (App. 21-22) was adopted in 1901, and by Article III there is a mandatory provision for the *separation of powers* of government. Further, Article XII Sec. 229 reserves control of corporations to the legislature, while Sec. 240 provides that *all* corporations shall have the power to *sue and be sued like natural persons.*

Yet in the case of *Tucker v. Mobile Infirmary Ass'n,* 191 Ala. 572, 68 So. 4, decided *seventeen years* after the adoption of the constitution, the judiciary again committed a transgression—again legislated—again blatantly usurped legislative powers, flew in the face of the constitutional require-

ments Article XV Sec. 229, namely, that *all* corporations shall have power to *sue and be sued.* By flagrant unilateral judicial action the doctrine of charitable immunity was imposed upon persons within the state to the extent that the so-called *charity* or *non-paying* patient *could not recover damages for tort.* This continues to be the law today.

Again it is submitted this judicial action is a flagrant violation of the guarantees of the Alabama Constitution, Article I, Secs. 13, 21, 36; Article III, Article XII Secs. 229 and 240, and 241 and are denials of due process under the Constitution of Alabama and Article XIV Section 1 of the Constitution of the United States.

Again in Tennessee where the Constitution (App. 22-24) was adopted in 1870, Article II, Sections 1 and 2 mandatorily provide for the *separation of powers,* and Article XI, Section 8 reserves the *control of corporations to the legislature.* Further, Section 2 of Article XI provides that nothing may impair the validity of *any suit, actions, or rights of actions.*

Tennessee is another jurisdiction where there was judicial transgression, where there was judicial legislation to impose on the victims of charitable negligence not only the burdens of their injuries but also unconstitutionally the economic consequences thereof.

In *Abston v. Waldon Academy,* 118 Tenn. 24, 102 S.W. 351, decided *thirty-seven* years after the adoption of the Tennessee Constitution, the judiciary blatantly usurped to itself legislative powers and held that though a charitable institution could be sued *none of the property of the private corporation used in its so-called charitable works could be attached.*

The charter of the Waldon Academy specifically provided that it could *sue and be sued,* yet the courts render that right a *total nullity* by its decision. This is still the law in Tennessee.

Interestingly the Legislature *has never immunized private corporations,* and by Article I, Section 17 the Constitution *even recognizes the right of suit against the State.* Thus immunity in Tennessee is not an accepted doctrine, either by the constitution or its general laws.

A review of the Tennessee Code, Annotated, Corporations reveals no section granting immunity, on the contrary Title 48 Section 117 reveals that private corporations shall have the power *to sue and be sued.*

Tennessee, consistent with the vogue of the times, through its over-zealous courts, adopted the charitable immunity doctrine, cavalierly *ignoring its own constitutional provisions,* and with impunity wiping out or ignoring valid legislative acts authorizing private corporations *to sue and be sued.*

Again it is submitted that this is a flagrant denial of due process and equal protection of the laws under the Constitution and laws of Tennessee, as well as Article XIV, Section 1 of the Constitution of the United States.

The Constitution of Massachusetts (App. 24-25) adopted in 1780, also provides for the *separation of powers* of Government by Part First, Article XXX. In addition, the constitution of Massachusetts provides the usual guarantees of equality of rights, Part First, Article I, and the guarantee of remedy for all injuries to person, Part First, Article XI. As in all states discussed, the legislature has the power of authorizing corporations, and the control over amending, modifying or repealing the corporate charters.

Massachusetts has the dubious distinction of being the progenitor of the *charitable immunity* doctrine in the United States. The first case to decide, by *judicial legislation,* that *private corporations* doing so-called charitable works were immune from tort suit was, *McDonald v. Massachusetts General Hospital,* 120 Mass. 432, 21 Am. Rep. 529 (1876).

The Massachusetts General Hospital was a private corporation incorporated by the *Acts of the Massachusetts Legislature of 1811*, passed February 25, 1811, Chapter 94, at pages 339-342.

Among the powers of the said private corporation, in *clear, unambiguous and positive language* is the power—*to sue and be sued.*

The Court in its consideration of the *McDonald case, supra, never discussed or even considered the charter* of this corporation, *which charter manifested the legislature's intent*—the legislature in which was vested, and which had the only authority to make or pass laws.

Thus, the judiciary, placing itself above the mandatory constitutional requirements of *separation of powers,* decided what was desirable and *legislated the charitable immunity* doctrine into existence.

This act of the Massachusetts judiciary, which continues to be invoked to the present, was not only a flagrant violation of the requirements of *separation of powers,* but was, further, a most flagrant violation of the constitutional guarantees of *equality and remedy* under the Constitution of Massachusetts, and a denial of due process and equal protection of the laws guaranteed by Article XIV, Section 1 of the Constitution of the United States.

The foregoing analysis of states adhering to the doctrine of charitable immunity is necessarily brief, however, there are a number of other states falling within the same category of judicially imposing the not only *unconstitutional,* but *totally invalid* doctrine of *charitable immunity,* contrary to provisions requiring *separation of powers, legislative control of corporations,* and *guarantees of rights of the person.*

It is therefore submitted that a decision in the instant case involves more than the resolution of a mere isolated problem, or single case, but has a substantial public interest, and will have a material far-reaching effect on the rights of persons in a large number of states in the future.

SUMMARY

The doctrine has been attacked by the text writers as an anachronism, every state that has discarded the doctrine has done so in the strongest of terms, *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810 (P. 13), *Bing v. Thunig*, 2 N.Y.2d 660, 163 N.Y.S.2d 3 (P. 14).

The logical question then is, why has this doctrine been so reviled in jurisdictions that have abrogated it, or have chosen not to accept it? The answers are simple. The doctrine is *totally alien* to *our basic constitutional concepts;* the doctrine was *imposed judicially, without foundation in law or fact;* and though never raised before the foregoing brief analysis clearly shows in each case, constitutionally:

1. That in each instance the judiciary transgressed the mandatory constitutional provisions of separation of powers.

2. That in every instance constitutional control over corporations is exclusively the preserve of the legislature.

3. That in every instance no immunity was granted to private corporations by the legislature.

4. That in every instance either by constitution or by general laws all private corporations have the right *to sue and be sued.*

The doctrine of charitable immunity is one of the most poignant examples of the courts' failure to look to its constitution and general laws and to apply them; and even more serious the courts' *unconstitutionally legislating* what they deemed desirable, contrary to valid legislation.

In the few instances where a court approached its task with diligence and perception, where the court looked to its laws and constitution, the results have been dramatically different, and the doctrine of charitable immunity was either never accepted or forthwith abrogated.

> "Title 10 of the Rev. Code deals with corporations and Sec. 10-0101 provides: 'The provisions of this

> title shall *apply to all corporations* other than public corporations, unless from the context of any statute a different intention plainly appears. This title provides (Sec. 10-0101) that, '*Every corporation has such power * * * to sue and be sued in any court* * * *' Chap. 10-108 of the title refers to *benevolent corporations not organized for profit; and nowhere do we find any exemption from liability for torts of agents.*" *Rickbeil v. Grafton Deaconess Hospital,* 74 N.D. 525, 23 N.W.2d 247 (see also *Nicholson v. Good Samaritan Hospital,* (Fla.) 199 So. 344; *Noel v. Menninger Foundation,* 175 Kan. 751).

It is submitted, from the foregoing, that in the State of Maryland, and those few states analyzed herein, that the doctrine of *charitable immunity* is a *total nullity.* The doctrine was invoked by the judiciary, in each instance transgressing the *separation of powers provisions, exclusive right of the legislature to control corporations,* and contrary to *valid* legislation granting to private corporations the right *to sue and be sued* (either by general laws, charters, or contrary to Constitutional provisions guaranteeing suit against private corporations).

This usurpation of powers and judicial legislation it is submitted is a most flagrant denial of due process under the various state constitutions, and a denial of due process and equal protection of the laws under Article XIV, Section 1 of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that their motion for rehearing be granted, and the Court issue a writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith, and not for delay and that it is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

D. Robert Cervera

APPENDIX

ACTS OF THE LEGISLATURE OF THE GENERAL ASSEMBLY OF MARYLAND OF 1830, CHAPTER 64, INCORPORATING THE HOUSE OF REFUGE

Section 1. Be it enacted by the General Assembly of Maryland that Ebenezer L. Finley, David Hoffman, Alexander Fridge, John H. B. Latrobe, Charles F. Mayer, Christian Keener, Jess Hunt and all such persons now, are or shall hereafter become subscribers to said association, in the manner hereinafter provided, be and they are hereby incorporated and made a body of politic in law, by the name, style and title, of *The House of Refuge*, and by that name, style and title shall have perpetual succession, with the power to have a common seal, and to change the same at pleasure; to make contracts relative to said institution, *to sue and be sued*, and by that name and style be capable in law of puchasing, taking, holding and conveying, any estate, real or personal, for the use of said corporation; and also to establish by-laws and orders for the regulation of said institution, and the preservation and application of the funds thereof.

Section 13. And be it enacted That an unlimited right is hereby reserved to the state, after the said sum of twenty thousand dollars shall have been paid to the said managers out of the profits aforesaid, to modify or repeal any provision of this act; and to regulate by law the government of the aforesaid House of Refuge, or also to abolish said institution or corporation.

CONSTITUTION OF MARYLAND OF 1867

DECLARATION OF RIGHTS

Article 8—Separation of Powers. That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

LEGISLATIVE DEPARTMENT

Article III, Section 48. Corporations. Corporations may be formed under general laws, but shall not be created by special Act, except for municiapl purposes and except in cases where no general law exist, providing for the creation of corporations of the same general character, as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void. All charters granted, or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered, from time to time, or be repealed; Provided, nothing herein contained shall be construed to extend to Banks, or the incorporation thereof. The General Assembly shall not alter or amend the Charter, of any Corporation existing at the time of the adoption of this Article, or pass any other general or special law for the benefit of such Corporation, except upon the condition that such Corporation shall surrender all claim to exemption from taxation or from the repeal or modification of its Charter, and that such Corporation shall thereafter hold its Charter subject to the provisions of this Constitution; and any Corporation chartered by this State which shall accept, use, enjoy, or in any use avail itself of any rights, privileges or advantages that may hereafter be granted or conferred by any general or special Act, shall be conclusively presumed to have thereby surrendered any exemption from taxation to which it may be entitled under its Charter, and shall be thereafter subject to taxation as if no such exemption has been granted by its Charter.

CONSTITUTION OF WYOMING OF 1890

ARTICLE I. DECLARATION OF RIGHTS

Section 2. Equality of all. In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.

Section 6. Due Process. No person shall be deprived of life, liberty or property without due process of law.

Section 8. Courts open to all. All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

ARTICLE II. DISTRIBUTION OF POWER

Section 1. Departments of Government. The powers of government of the state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of power belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

ARTICLE X. CORPORATIONS

Section 1. The legislature shall provide for the organization of corporations by general law. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time when necessary for the public good and general welfare, and all corporations doing business in this state may as to such business be regulated, limited or restrained by law not in conflict with the Constitution of the United States.

Section 2. Damages; no limit. No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void. As to all extra hazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be fixed by law according to proper classifications to each person injured in such employment or to the dependent families of such as die as the result of such injuries, except in cases of injuries due solely to the

culpable negligence of the injured employee. Such fund or funds shall be accumulated, paid into the state treasury and maintained in such manner as may be provided by law. The right of each employee to compensation from such fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to such fund in favor of any person or persons by reason of any such injuries or death.

CONSTITUTION OF COLORADO OF 1876

ARTICLE II. BILL OF RIGHTS

Section 6. Equality of Justice. The Courts of Justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and right and justice should be administered without sale, denial or delay.

Section 25. Due Process. No person shall be deprived of life, liberty, or property without due process of law.

ARTICLE III. DISTRIBUTION OF POWERS

The powers of Government of this State are divided into three distinct departments—The Legislative, Executive, and Judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted.

ARTICLE XV. CORPORATIONS

Section 2. Corporate charters created by general law. No charter of incorporations shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the State; but

the General Assembly shall provide by general laws of the organization of corporations hereafter to be created.

Section 3. Power to revoke, alter, or annul charter. The General Assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators.

CONSTITUTION OF SOUTH CAROLINA OF 1895

ARTICLE I. DECLARATION OF RIGHTS

Section 5. Privileges and immunities; protection of laws. The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws.

Section 14. Departments separate. In the government of this State the legislative, the executive, and the judicial powers of the Government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Section 15. Courts; remedy. All Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.

ARTICLE IX. CORPORATIONS

Section 2. Charter of incorporation. No charter of incorporation shall be granted, changed or amended by special law, except in the case of such charitable, educational, penal, or reformatory corporations as may be under the control of the State, or may be provided for in this

Constitution, but the General Assembly shall provide for general laws for changing or amending existing charters, for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration; Provided, That the General Assembly may by two-thirds vote of each House on a concurrent resolution allow a Bill for a special charter to be introduced, and when so introduced may pass the same as other Bills.

CONSTITUTION OF ALABAMA OF 1901

ARTICLE I. DECLARATION OF RIGHTS

Section 13. Judicial remedies. That all courts shall be open; that every person, for any injury done to him, in his lands, goods, person, or reputation shall have remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Section 21. Suspension of laws. That no power of suspending laws shall be exercised except by the Legislature.

Section 36. Reserved rights. That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.

ARTICLE III. DISTRIBUTION OF POWERS OF GOVERNMENT

Section 43. Separation of powers. In the government of this State, excepted instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial

shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

ARTICLE XII. CORPORATION

Section 229. General corporate law. The legislature shall pass no special act conferring corporate powers, but it shall pass general laws under which corporations may be organized and corporate powers obtained, subject nevertheless to, repeal and the will of the legislature; and shall pass general laws under which charters may be altered or amended. The legislature shall by general law, provide for the payment to the State of Alabama of a franchise taxed by corporations organized under the laws of this State, which shall be in proportion to the amount of capital stock; but strictly benevolent, educational, or religious corporations shall not be required to pay such a tax. The charter of any corporation shall be subject to amendment, alteration or repeal under general laws.

Section 240. Corporate right to sue and be sued. All corporations shall have the right to sue, and shall be subject to be sued, in all courts and liked cases as natural persons.

Section 241. Definition of corporation. The term "corporation" as used in this Article shall be construed to include all joint stock companies, and all associations having any of the powers or privileges of corporations not possessed by individuals or partnerships.

CONSTITUTION OF TENNESSEE OF 1870

ARTICLE I. DECLARATION OF RIGHTS

Section 6. Trial by Jury. That the rights of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification of jurors.

Section 8. No man to be disturbed but by law. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges or outlawed, or exiled, or in any

manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land.

Section 17. Courts shall be open; redress of injuries, suits against the State. That all courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay; suits may be brought against the state in such manner and in such courts as the legislature may by law direct.

ARTICLE II. DISTRIBUTION OF POWERS

Section 1. Division of Powers. The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

Section 2. No person to exercise powers of more than one department. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

ARTICLE XI. MISCELLANEOUS PROVISIONS

Section 2. No rights, contracts, action, etc. Nothing contained in this Constitution shall impair the validity of any debts, or contracts, or affect any rights of property or any suits, actions, rights of action or other proceedings in Courts of Justice.

Section 8. General laws only to be passed; corporations only to be provided for by general laws. The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general law of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community, who may be able to bring

himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws, but the General Assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may at any time be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested.

Section 16. Bill of Rights to remain inviolate. The declaration of rights hereto prefixed is declared to be part of the Constitution of this State, and shall never be violated on any pretense whatever. And to guard against transgressions of the high powers we have delegated, we declare that everything in the Bill of Rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

CONSTITUTION OF MASSACHUSETTS OF 1780

Part First

ARTICLE I. EQUALITY OF NATURAL RIGHTS OF ALL MEN

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

ARTICLE XI.

Every subject of the commonwealth ought to find a certain remedy by having recourse to the laws; for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, without being obliged to purchase it; completely and without any denial; promptly, and without delay; conformably to the law.

ARTICLE XXX. SEPARATION OF EXECUTIVE, JUDICIAL AND LEGISLATIVE DEPARTMENTS

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative or judicial powers, or either of them: the judicial shall never exercise the legislative or executive powers, or either of them: to the end it may be a government of laws and not of men.